United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,603

ATLANTIC BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

WASHINGTON BROADCASTING COMPANY,

WOL, INC.,

Intervenors.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Federal Communications Commission erred in concluding, without a hearing, that the assignee had ascertained the needs and interests of the community to be served.

2. Whether the Commission erred in concluding, without a hearing, that the assignee's proposal, which included changes in the program service of station WOL, would serve the public interest, convenience and necessity.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 66 Stat. 719, U.S.C. Title 47, Section 402 (b)(6), from a Memorandum Opinion and Order of the Federal Communications Commission dated July 7, 1965, granting an application for its consent to an assignment of a license for a standard broadcast station.

STATEMENT OF THE CASE

On April 8, 1965, there was filed with the Federal Communications Commission an application for its consent to an assignment of the license for standard broadcast Station WOL, Washington, D. C. from the licensee, Washington Broadcasting Company, to the proposed assignee, WOL, Inc. (R. 1.)

From the commencement of its operations in 1924, Station WOL has been programmed so as to serve the general public of the Washington metropolitan area. Now, however, the proposed assignee said that the station was "being acquired to serve the Negro community of the District of Columbia." (R. 107.)

On May 17, 1965, this appellant petitioned the Commission to designate the subject application for hearing on issues to determine whether the proposal would serve the public interest, convenience and necessity. (R. 136.) In particular, the appellant pointed out (a) that the Commission could not, solely on the basis of the application, reach a determination that the need for the service to be gained outweighed the need for the service to be withdrawn, and (b) that the application showed nothing to indicate that the proposed assignee had met the Commission's requirement that it ascertain the needs and interests of the community to be served. (R. 136-142.)

On May 21, 1965, the proposed assignee filed with the Commission an amendment of the subject application, purporting to show the efforts it had made to ascertain the needs and interests of the Negro community of Washington. Most of the showing was devoted to a relation of the first and only interviews the proposed assignee had conducted with civic leaders in the city, purportedly commencing on Saturday, May 15, and continuing through Wednesday, May 19, 1965. In addition, the proposed assignee told of "casual interviews" it had conducted with "more than 50" Negroes in the Washington area during the prior year, and that

"practically every" one had "indicated that the programs proposed would be the answer to a real need . . . ." (R. 21-23, 146-149.)

On May 25, 1965, the proposed assignee filed an opposition to the appellant's petition, basing it principally on the amendment filed the day before. (R. 150.) On the matter of the withdrawal of the existing service of the station, the opposition pleading contained only the following:

> "As to the loss of existing WOL programming, proposed assignee believes it is necessary to only bring to the Commission's attention the fact that the area is already served by a multiplicity of signals from general outlet stations." (R. 154.)

On June 4, 1965, this appellant filed a reply pleading. (R. 166.) On July 7, 1965, the Commission adopted an order denying the appellant's petition for a hearing and granting the subject application. (R. 185.) This appeal followed.

STATUTES INVOLVED

Communications Act of 1934, as amended:

> Sec. 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. 74 Stat. 889, U.S.C., Title 47, Section 309(a).
>
> Sec. 309(d)(1) Any party in interest may file with the Commission a petition to deny any application . . . at any time prior to the day of Commission grant thereof without hearing . . . 74 Stat. 890, U.S.C., Title 47, Section 309(d)(1).

Sec. 309(d)(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition . . . If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e). 74 Stat. 891, U.S.C., Title 47, Section 309(d)(2).

Sec. 309(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . 74 Stat. 891, U.S.C., Title 47, Section 309(e).

STATEMENT OF POINTS

The Commission acted arbitary, capriciously and contrary to law in granting the subject application without first ordering a hearing:

(a) To determine whether the need for the service to be gained outweighed the need for the service to be lost if the subject application were granted, and

(b) To determine whether the proposed assignee had met the requirement for ascertaining the needs and interests of the community to be served.

SUMMARY OF ARGUMENT

The Commission is required by law to order a hearing on an application for broadcasting facilities where, for any reason, it cannot make the finding that the public interest, convenience and necessity will be served by a grant, or where substantial and material questions of fact or of policy are presented.

Before the subject application could be granted, the Commission was required to determine whether the need for the proposed new service to the Negro population of the District of Columbia outweighed the need for the existing service to the general public of the Washington metropolitan area. The application and the pleadings before the Commission provided it little or no information on the basis of which it could make that determination. In accordance with its regular practice when a comparative determination of public need is required, the Commission ought to have ordered a hearing.

A substantial and material question was presented as to whether the proposed assignee of Station WOL had met the known requirement of the Commission that an applicant ascertain the needs and interests of the community to be served. It was shown that the proposed assignee had made no efforts to ascertain needs and interests before developing its program proposal, and that the efforts it made thereafter, even if entitled to any consideration, were so seriously inadequate in terms of the Commission's established standards for such efforts as to make it impossible for the Commission to conclude, without a hearing, that its requirement had been met.

ARGUMENT

Section 309 of the Communications Act authorizes the Commission to grant an application for its consent to the sale of a broadcasting station, but only if the Commission can find that the public interest, con-

venience and necessity will be served thereby.[1] If the Commission is unable to make that finding for any reason, or if substantial and material questions of fact have been presented, the Commission must order a hearing.[2] *Hudson Valley Broadcasting Corp. v. FCC*, 116 U.S. App. D.C. 1, 5, 320 F.2d 723, 727 (1963). This Court has also held that the Commission may not properly grant an application without a hearing where "significant policy issues" are raised. *Louisiana Television Broadcasting Corp. v. FCC*, ___ U.S. App. D.C. ___, ___ F.2d ___, Nos. 18,621, 18,628, decided May 11, 1965, 5 Pike & Fischer RR 2d 2025, 2028 (1965). Here the appellant raised issues which "should not ordinarily be decided summarily" and "without the full record of facts and adversary views a hearing would provide." *Ibid.*

I. The Need for the Service To Be Gained and the Need for the Service To Be Lost.

By the subject application, the proposed assignee declared its intention to discontinue nearly all the programming being broadcast by Station WOL[3] and to substitute new programming designed to appeal to the Negro audience. It was thus proposed to discontinue a service of 30 years standing now available to the 2,000,000 people of the Washington metropolitan area and to substitute a new service directed to the 412,000 persons of the Negro community of the District of Columbia. The Commission's duty was to determine whether the need for the service to be gained outweighed the need for the service to be lost, but neither the application itself nor the subsequent pleadings gave the Commission enough information on which to base such a determination. This lack of an adequate basis is illustrated by the following:

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[1] 74 Stat. 889, U.S.C., Title 47, Section 309(a).

[2] 74 Stat. 890, 891, U.S.C., Title 47, Sections 309(d)(1), 309(d)(2) and 309(e).

[3] Preserving only the programs received from a network, which would constitute just 5.36 % of the assignee's program schedule. (R. 149.)

No facts had been presented as to the nature and extent of the service to be withdrawn, except to characterize WOL as a "general outlet" station. (R. 154.)

No facts had been presented as to how much the existing service was needed by the persons then relying upon it.

No facts had been presented as to the availability of other similar services to those persons, except for the general allegation that there is a "multiplicity" of similar services in the area. (R. 154.)

The Commission did not have before it a full showing as to the nature and extent of the proposed new service.

The Commission did not have before it a full showing as to how much the proposed new service was needed by the persons who would receive it.

The Commission did not have before it a full showing as to the availability of other similar services to those persons.

The Commission has regularly and consistently adhered to the requirement of law that it refrain from making comparative determinations of public needs for alternative services without first holding hearings. Where, for example, the Commission has been presented with applications for radio facilities which would cause objectionable interference to the services of existing stations, it has acted as the law requires and has ordered hearings to determine the comparative public need for the service to be gained and the service to be lost in each case. See *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948), as the landmark case, and *Eastside Broadcasting Co.*, 3 Pike & Fischer RR 2d 505 (1964), and *Pinellas Radio Co.*, 2 Pike & Fischer RR 2d 155 (1964), as recent illustrations. And where, as a further example, the Commission has been called upon to choose between mutually exclusive applications for radio facilities in different communities, it has acted as the law requires and has ordered hearings to determine the comparative needs

of the communities involved. A recent illustration is *Service Broadcasting Corp.*, 2 Pike & Fischer RR 2d 539 (1964). In such cases, the Commission has taken and relied upon detailed evidence as to the history of the communities involved, the characteristics of the populations and areas, the nature of the local businesses and industries, the religious, educational, eleemosynary, social, recreational, civic and cultural institutions, facilities and activities, the areas and populations which would gain and lose service and the numbers and kinds of other services available to them, and, in light of all such evidence, the comparative needs of the populations involved not only for reception service but for an outlet for local expression.

In the instant case, a determination that the need for the proposed new service outweighed the need for the existing service would have been a difficult one to make even on the basis of a full record, and a full testing of the contrasting allegations of the parties by the means of cross examination and rebuttal. For the Commission to have reached that determination on the basis of what was before it at the time it granted this application is both logically impossible and legally improper. It was the Commission's duty to refrain from resolving so serious a question until it had secured a full record, and this Court is obliged to remand the matter to the Commission so that its duty may be done. *Louisiana Television Broadcasting Corp. v. FCC, supra; Wometco Enterprises, Inc. v. FCC,* 114 U.S. App. D.C. 261, 314 F.2d 266 (1963)

II. The Requirement To Ascertain the Needs and Interests of the Community To Be Served.

An applicant for broadcasting facilities is required to submit with the application a showing of proposed programming, including a program schedule for a proposed typical week of operation. (See R. 65-66.) In 1960, the Commission adopted a new requirement to be met by each applicant, viz., that the applicant take steps to ascertain the needs and interests of the population it seeks to serve, and that the program pro-

posal contain provision for meeting the needs and interests so ascertained.[4] The requirement was first enunciated by the Commission in its "Report and Statement of Policy . . ." on programming matters (20 Pike & Fischer RR 1901) wherein the Commission said that it,

> ". . . does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the area they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests. . . What we propose will not be served by pre-planned program format submissions accompanied by complimentary references from local citizens. What we propose is documented program submissions prepared as the result of assiduous planning and consultation covering two main areas: First, a canvass of the listening public . . . Second, consultation with leaders in community life - public officials, educators, religious, the entertainment media, agriculture, business, labor - professional and eleemosynary organizations, and others who bespeak the interests which make up the community." *Id.* at 1913, 1915.

The importance which the Commission attached to the new requirement was made dramatically clear in the first case in which it was applied. *Suburban Broadcasters*, 20 Pike & Fischer RR 951 (1961), aff'd *sub nom Henry, et al. v. FCC*, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 Pike & Fischer RR 2016 (1962). There the Commission denied an application for a construction permit for a new FM broadcast station at Elizabeth, New Jersey, on finding that the applicant's principals were not residents of the community and had made no effort to ascertain its particular program needs. Instead, the applicant had proposed programming which was the same as it had used for stations in two other communities. The Commission concluded that,

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[4] The requirement is minimized where the applicant is shown to have had long-term residence in the community to be served [*John Self*, 25 RR 675 (1963), *Bootheel Broadcasting Company*, 24 RR 292 (1962)], but that is of no concern here for none of the three principals of the proposed assignee ever resided in Washington or ever had any business or other interest in the community. (R. 60, 83-86.)

> "The instant program proposals were drawn up on the basis of the principals' apparent belief - unsubstantiated by inquiry, insofar as the record shows - that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois . . . or . . . could be served in the same manner that such needs are served by FM broadcasters generally." *Id.* at 952b.

A series of subsequent cases served to define the requirement and to establish standards as to what kinds of efforts to ascertain needs were acceptable and unacceptable. See, e.g., *Herbert Muschel*, 23 Pike & Fischer RR 1059, 1065-6 (1962); *Higson-Frank Radio Enterprises*, 2 Pike & Fischer RR 2d 755, 765-8 (1964); *Saul M. Miller*, 5 Pike & Fischer RR 2d 880, 891-893 (1965). It was this background which enabled this Court to say, earlier this year,

> "Well established Commission policy requires that each application . . . contain detailed data on efforts to determine and fulfill the programming needs of the entire service area . . . Both this court and the Commission have held that a Section 309(e) hearing is necessary if this kind of programming issue has been raised in a petition to deny." *Louisiana Television Broadcasting Corp. v. FCC*, 5 Pike & Fischer RR 2d 2025, 2029, N. 5 (1965).

The most obvious element of the standards which the Commission has developed for showings on this subject is that an applicant's efforts to ascertain needs and interests must be made before the proposed programming is decided upon. In its first declaration on the matter the Commission rejected "pre-planned" program submissions and said it would insist upon "documented program submissions prepared as the result of assiduous planning and consultation" with listeners and with civic leaders (emphasis supplied), then it went on to point out that,

> "By the care spent in obtaining and reflecting the views thus obtained . . . will the standard of program-

> ming in the public interest be best fulfilled. This would not ordinarily be the case if program formats have been decided upon by the licensee before he undertakes his planning and consultation, for the result would show little stimulation on the part of the two local groups above referenced." "Report and Statement of Policy . . .", 20 Pike & Fischer 1901, 1915-1916 (1960).

The assignee in this case has acknowledged from the outset that it did absolutely nothing to ascertain the needs and interests of the Negro community of Washington before it developed the program proposal in the subject application. That fact alone ought to have forced the Commission to order a hearing to determine whether there was any other basis on which it could find that the assignee had come to know the needs of the community before preparing its programming, and had made provision to serve them. In not one of its many published cases has the Commission approved efforts to ascertain needs and interests where all the efforts were made after the programming was developed and the applicant had no prior knowledge of the community.

The assignee's answer here is that it based its judgment on its experience in the operation of Negro-oriented stations in other communities, that it did make a survey in Washington although after its programming was developed, and that this survey confirmed its first judgment as to the existing needs and interests. (See R. 150-154.) The difficulty, however, is that the Commission could give no weight or consideration to those assertions because it had already admonished all applicants that such matters could not be relied upon. In three cases, *Don L. Huber*, 2 Pike and Fischer RR 2d 243, 256-7 (1964), *Geoffrey A. Lapping*, 2 Pike & Fischer RR 2d 201, 236 (1964), and the landmark case of *Suburban Broadcasters*, 20 Pike & Fischer RR 951, 952b (1961), aff'd *sub nom Henry, et al. v. FCC*, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 Pike & Fischer RR 2016 (1962), the Commission made it plain that an appli-

cant cannot meet the requirement for ascertaining needs and interests by offering a program proposal derived from its experience with programming for communities elsewhere. What the applicant was obliged to ascertain was the particular needs and interests of the particular community to be served. Then, in *Higson-Frank Radio Enterprises*, 2 Pike & Fischer RR 2d 755 (1964), the Commission declared:

> "An applicant which has failed in its duty cannot be saved by virtue of the fact that it may have fortuitously hit upon a program format which would be useful to the community in question." *Id.* at 768.

In *Saul M. Miller*, 5 Pike & Fischer RR 2d 880 (1965), the Commission expressly held that where an applicant's program proposal is based on inadequate information as to community needs and interests, subsequent surveys to determine the needs and interests do not cure the defect unless the program proposal is then modified to reflect the needs and interests so ascertained. *Id.* at 891-893. The assignee here did nothing to alter its program proposal after completing its belated efforts to ascertain the needs and interests of the community it proposed to serve.[5]

Finally, in a proceeding which has not yet reached the Commission for final disposition, a Commission Hearing Examiner refused to receive in evidence a massive exhibit showing an applicant's efforts to ascertain needs and interests, holding that:

> "The principal value of community surveys is to secure opinions as to how the station's programming can best serve the community. Patently, surveys conducted subsequent to the submission of an applicant's most recent programming proposal cannot have affected such proposal." *Chicagoland TV Co.*, 4 Pike & Fischer RR 2d 882, 885 (1965).

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[5] By its amendment filed May 21, 1965 (R. 18-19, 146-149) the proposed assignee made minor alterations in the classifications in its program schedule for Sundays, but this did not involve changes in the programs themselves.

The Commission's failure to order a hearing in the face of the knowledge that the proposed assignee had not met the threshold element of the Commission's requirement is by itself sufficient to lead the Court to remand this matter for further proceedings, and the appellant might rest its case here. There can be no doubt, however, that the assignee will make much of the efforts it says it made to ascertain needs, and the appellant will therefore deal with them here.

Assuming then, *arguendo*, that the applicant's efforts made after its program proposal was developed are to be given any serious consideration, this appellant can show that the assignee's presentation falls short of the Commission's standards of acceptable efforts in at least four major particulars.

As we have already seen, one of the things the Commission took pains to make clear was that a showing of comments by local residents praising or approving an applicant's proposed program ideas would be unacceptable as a meeting of the requirement. Yet in this instance, as to every person the proposed assignee claimed to have talked with, it did nothing more than to present its programming ideas and to solicit complimentary comments. (R. 9-16.) The Commission's acceptance of precisely the methods it condemned in advance, and its refusal to order a hearing to permit a sensible determination as to whether such methods might be accepted notwithstanding the Commission's interdiction against them, was plainly arbitrary and capricious.

In adopting its requirement, the Commission specified that there were two main areas of activity which would have to be included in an applicant's "assiduous planning and consultation," namely, a "canvass of the listening public," and "consultation with leaders in community life."

The purported efforts of the proposed assignee's representative, a Mr. Ward, could scarcely be accepted by the Commission as a "canvass

of the listening public." The number of persons he claimed to have interviewed is stated to have been "more than 50," and there was no apparent reason why the number had to be stated so indefinitely. (R. 9, 15.) Whatever the actual number was, the Commission could not, without a further showing, conclude that it was a sufficient number in a community of 412,000 people. Moreover, those conversations were characterized by the proposed assignee as "casual interviews." (R. 15.) The Commission could not have known what that expression was intended to mean, and it most certainly could not accept that expression as placing the assignee's efforts within the Commission's standards of "assiduous planning and consultation."

Finally, as to the purported efforts of the proposed assignee to consult with leaders in community life, it is impossible to see how the Commission could have concluded summarily that they were acceptable as substantial efforts to ascertain needs and interests. Given that the talks involved representatives of only 13 organizations and institutions in a community of 412,000 (R. 9-10), the Commission could not have reached the conclusion, without a further showing, that this was calculated to produce a comprehensive revelation of community needs and interests. Moreover, the assignee's showing was suspect on another ground. It was apparent that the assignee used the device of offering an organization representative free broadcast time, then asking him to comment to the effect that the matter so broadcast would serve public needs and interests. If for no other reason, a hearing was required to determine whether this could be considered a valid means for ascertaining needs and interests.

Returning once more to the Commission's first declaration of policy on this subject, the Commission also said,

> "By his narrative development, in his application, of the planning, consulting, shaping, revising, creating, discarding and evaluation of programming thus con-

> ceived or discussed, the licensee discharges the public interest facet of his business calling . . . and permits the Commission to discharge its responsibility to the public . . ." "Report and Statement . . .", 20 Pike & Fischer RR 1901, 1916.

This appellant urges that, taking together the serious shortcomings in the assignee's showing of its efforts to ascertain needs and interests — and again assuming that the showing is entitled to any consideration at all in view of the fact that the efforts were made after the programming was developed — the Commission could not reasonably have concluded without a hearing that the assignee had met the standard thus expressed.

If ever there was a set of circumstances which ought to have induced the Commission to shun summary action and to order a hearing to permit full inquiries, we have one here. Following are the kinds of questions which cry out for consideration in the crucible of examination, cross examination and rebuttal.

Given that the proposed assignee made no efforts to ascertain the needs and interests of the Negro community of the District of Columbia before it developed its proposed programming, what was the basis for its judgment that its proposed programming would meet those needs and interests?

If the basis of the assignee's judgment was the experience it had in operating Negro-oriented stations in other communities, what was that experience, and is there a basis for concluding that it would enable a judgment as to the needs and interests of the Negro population in the District of Columbia?

What was the nature of the "casual interviews" conducted by the applicant?

Why is it that the proposed assignee cannot say more precisely how many people were interviewed, who they were, and where and when the interviews took place?

Why did the proposed assignee wait until more than five weeks after the application was filed to seek consultations with civic leaders, and what prompted the launching of those efforts at that time?

Did the proposed assignee use the inducement of free program time to obtain representations that its proposed program services were needed in the community, and, if so, to what extent can the reported representations be relied upon?

What civic leaders are there in the community beyond the few consulted, and why were they not consulted?

Would the assignee's proposed program schedule actually meet existing unfulfilled needs?

CONCLUSION

The order appealed from herein must be reversed and the case remanded to the Commission for the holding of the hearing it must conduct in order to have the record necessary to permit resolution of the substantial questions raised by the appellant and a sound determination as to whether a grant of the subject application would serve the public interest, convenience and necessity.

Respectfully submitted,

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November 5, 1965

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STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties have agreed by a prehearing stipulation dated October 14, 1965 and approved by the Court on October 27, 1965 that the questions presented by this appeal are as follows:

1. Whether the Commission erred in concluding, without a hearing, that the assignee had ascertained the needs and interests of the community to be served.

2. Whether the Commission erred in concluding, without a hearing, that the assignee's proposal, which included changes in the program service of station WOL, would serve the public interest, convenience and necessity.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Since appellant's statement of the case is not complete, it is believed that the following statement of the material facts in the case would be of assistance to the Court.

This is an appeal filed pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6), from a Memorandum Opinion and Order, released on July 12, 1965 (R. 185-188), which (1) denied Atlantic Broadcasting Company's petition to deny, and (2) granted the applications for the assignment of the licenses of stations WOL-AM and FM, located

in Washington, D. C., from Washington Broadcasting Company to WOL, Inc.[1/] The pertinent facts are as follows:

On April 8, 1965, applications were filed seeking Commission approval of the assignment of the licenses of stations WOL-AM and FM, located in Washington, D.C., from Washington Broadcasting Company (hereinafter referred to as assignor) to WOL, Inc. (hereinafter referred to as assignee) (R. 1-109). The corporate assignee, created under the laws of the District of Columbia, is a wholly owned subsidiary of Sonderling Broadcasting Corporation,[2/] which prior to the consummation of the transaction in question controlled five standard broadcast stations and two FM broadcast stations located in different sections of the country (R. 86).

In the assignment application, the assignee proposed a balanced programming schedule[3/] with special emphasis upon serving the needs and interests of the large number of Negro

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1/ Appellant's petition to deny, Notice of Appeal and brief were directed solely to the grant of the assignment of station WOL, and the assignment of WOL-FM was not challenged.

2/ The same three principals who control Sonderling Broadcasting Corporation are the officers and directors of the assignee (R. 121).

3/ Specifically, the assignee proposed that for a typical week of operation 67.75% of the program time would be devoted to entertainment programs; 12.44% to religious; 2.26% to educational; 10.92% to news; 1.49% to discussion; and 5.14% to talks (R. 65). The assignee proposed to devote 10.12% of its program time to local live programs (R. 149). In its application, assignee also submitted a general statement regarding the nature of its proposed programming (R. 107-108).

citizens residing within the station's service area.[4] (R. 107). In support of its claimed expertise in the field of specialized programming, the assignee indicated that it had gained broad experience with such programming in the operation of such Negro-oriented stations as WDIA(AM), Memphis, Tennessee; KDIA(AM), Oakland, California; and WWRL(AM), New York, New York (R. 107). Additionally, it stated that stations WOPA-AM and FM, in Oak Park, Illinois, have been pioneers in Negro-oriented programming, and that the other broadcast stations it operates, KFOX-AM and FM, in Long Beach, California, are specializing in a country-western music format which requires a special accommodation to a specific audience (R. 107).

On May 17, 1965, Atlantic Broadcasting Company (appellant), the licensee of standard broadcast station WUST, located at Bethesda, Maryland, filed petition to deny pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d), directed against a grant of WOL's pending assignment application[5] (R. 136-145). Appellant based its claim of standing on the ground that WUST has for many years been serving the Negro population of Washington, D.C. and its

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4/ There are approximately 549,100 Negroes residing in the Metropolitan Washington area. Spot Radio Rates and Data, August 1, 1965, p. 50, Col. 3.

5/ The assignee filed an opposition (R. 150-165) to appellant's pleading and appellant, in turn, filed a reply (R. 166-177) to the opposition.

environs and that if the sale of these neighboring stations was approved WOL would be converted to a Negro-oriented facility which would be in direct and immediate competition with WUST for audience, advertising revenues, program material and talent (R. 136-137). In its decision, the Commission agreed that this alleged private competitive injury was sufficient to confer standing on appellant as a "party in interest" within the meaning of Section 309(d)(1) of the Communications Act (R. 185).

On the merits, appellant's chief contention was that assignee proposed a major change in WOL's programming (i.e., to a Negro-oriented format) without sufficiently ascertaining the programming needs and interests of the Negro population in the community to be served. Appellant requested that the WOL assignment application be designated for an evidentiary hearing to consider this matter.

On May 24, 1965, the assignee filed an amendment to its application setting forth a full chronology of the steps it had taken to ascertain the programming needs and interests of the public residing within station WOL's service area (R. 9-16). The assignee stated that its representatives had studied and surveyed the Washington Negro community with specific reference to its broadcast needs (R. 9). It stated that commencing in January, 1964, a representative of the assignee had visited the

Washington area for periods ranging from one to four days on ten or more occasions, during which time he monitored two local Negro-oriented stations, as well as other local general outlet stations (R. 9). In addition, the assignee's representative had discussed the needs of the community with more than fifty Negro citizens residing in the area in order to determine how the station could most effectively fulfill their needs and interests (R. 15). According to the assignee, the persons interviewed - practically without exception - disclosed a real need for the type of programming proposed by assignee (R. 15). On the basis of these studies and surveys, assignee submitted a proposed programming schedule designed to accommodate the needs of the area (R. 18-19, 93-106).

Furthermore, lending support to the representation that its efforts to ascertain the needs of the area have been and will be continuing in nature, the assignee noted that, subsequent to the filing of its application but prior to the filing of the petition to deny, it had arranged for personal meetings with a number of community leaders active in Washington civic organizations (R. 9-10).[6/] During interviews with twenty-

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6/ These discussions were with officials of the following organizations:
Washington chapter of the National Association for the Advancement of Colored People (NAACP); Howard University; Washington office of the Student Non-Violent Coordinating Committee (SNCC); Spotlight magazine; Methodist Ministerial Conference; District of Columbia Council of Churches; Federation of Civic Associations; Social Security Administration; Washington chapter of the Congress of Racial Equality (CORE); Legal Aid Society; Better Business Bureau; Washington chapter of the Urban League; and the Capital Press Club.

(con't.)

two community leaders, assignee indicated that it's representatives discussed with them the program needs of the area, the extent to which such needs were then unfulfilled, specific program proposals, as well as the programming in general, and the means by which these various organizations and assignee would cooperate so as to most effectively present special programs of interest and merit (R. 9-16). Assignee indicated that these discussions confirmed its judgment, reached as a result of the surveys and studies undertaken prior to filing of the application, that there were unfilled program needs in the community and that the programming proposed would fulfill those needs (R. 9, 153). Furthermore, assignee amended its programming schedule following these interviews so as to provide for the participation of many of these organizations in specific programs (R. 18-19).

In its petition to deny, the appellant also contended that the Commission should hold a hearing to inquire into the need for the program changes which assignee proposed. In this regard, assignee argued that a hearing was required to determine whether the need for the proposed new service outweighed the need for the service to be lost. In responding to this argument, the assignee noted that the results of its surveys and interviews revealed a need for the new specialized service (R. 154) and it also pointed to the fact that the area is already served

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6/ (con/t.) The names of the persons contacted and the results of the interviews were set forth in detail in an amendment to the assignment application (R. 9-16).

by a multiplicity of signals from general outlet stations (R. 154).[7] Appellant did not allege any facts to refute assignee's contention that the new service was needed or to show that the public would suffer as a result of the discontinuance of some of the programming formerly broadcast over WOL.

By Memorandum Opinion and Order (R. 185-188) released July 12, 1965, the Commission denied appellant's petition to deny and granted the assignment applications. In essence, the Commission determined that no substantial or material questions of fact were presented on either issue requiring resolution by way of an evidentiary hearing and that a grant of the applications would serve the public interest.

The Commission fully considered the methods utilized by the assignee in surveying the community involved, as well as its overall program schedule, and held that the proposed programming reflected a sufficient ascertainment of the needs and interests of all segments of the community to be served. In making this determination, the Commission rejected appellant's contention that the Report and Statement of Policy re: Commission En Banc Programming Inquiry[8] fixed the only acceptable method of ascertaining community needs, stating (R. 186):

7/ There are thirty-two aural broadcast facilities licensed in the District of Columbia and surrounding areas. Of this number, only two stations in addition to WOL, namely, WUST (Bethesda, Maryland) and WOOK (Washington, D. C.), specialize in Negro-oriented programming. 1965 Broadcasting Yearbook, January, 1965, 53rd issue, pp. B 29-30.

8/ 25 Fed. Reg. 7291, 20 Pike & Fischer, R.R. 1901 (1960).

> "As we have stated on several occasions, our report on En Banc Programming Inquiry, supra, did not set a rigid method by which an applicant must demonstrate that it has taken adequate steps to ascertain the needs and interests. cf. WGRY, Inc. 2 RR 2d 718 (1964); In re ABW Broadcasters, Inc., 1 RR 2d 65 (1963); and Bootheel Broadcasting Co., FCC 62 R-57, 24 RR 292. In the case now before us we have noted that the specific steps taken by the assignee found favorable response to the proposed programming changes and that the Commission has received no complaint from the listening public about these changes which have received wide publicity in the local press."

In this connection, the Commission noted that the assignee has scheduled programs for civil rights organizations and that officials in these organizations have commented favorably on the assignee's programming proposals (R. 187). It further noted that, consistent with the Commission's view that programming surveys should not systematically exclude members of any race, the assignee had also elicited a favorable reception to its proposals from leaders of community organizations which do not represent any particular ethnic or racial group (R. 187).

Considering the nature of the proposed programming, the Commission found that the assignee had reasonably ascertained that there was a need for a new Negro-oriented station in Washington, D. C.; that its programming was responsive to these needs; and that members of the general public and community organizations contacted by assignee responded favorably to the proposed program changes (R. 186-187). The Commission also noted that some of the

programming formerly carried on WOL (e.g., Mutual Network shows) would be continued by the assignee; that other stations in the area carry programming similar to that formerly carried on station WOL; and that no member of the listening public has protested the change to specialized programming (R. 187).[9/]

In short, both as to the way in which the assignee had ascertained the needs and interests of the community and the manner in which its proposed programming would be responsive thereto, WOL, Inc. was found to comply with the existing rules and policies of the Commission. The assignment was consummated on July 9, 1965, and the assignee has been operating these stations since that date. Concurrently with the filing of this appeal appellant requested that the Court stay the effectiveness of the Commission's order pendente lite. This request was denied on September 24, 1965.[10/]

9/ In addition to publicity in the local press, public notice of the proposed assignment was published in the Wasnington Daily News and broadcast over stations WOL-AM and FM in accordance with the Commission's Rules and Regulations (R. 122-124).

10/ Following the filing of its brief in this case, on November 26, 1965, appellant submitted a "Petition For Reconsideration, Request For Late Acceptance, And Motion For Expedited Consideration" challenging certain aspects of the assignee's programming survey.

SUMMARY OF ARGUMENT

I.

The Commission acted well within its discretion in deciding that the assignment application should be granted without hearing. No substantial or material questions of fact were presented which required resolution by way of an evidentiary hearing and the Commission reasonably found that the public interest would be served by a grant of the application. 47 U.S.C. 309(d)(2), 309(e).

A.

The Commission correctly rejected appellant's argument that assignee had not sufficiently ascertained that a need existed in station WOL's service area for the type of programming it proposed to broadcast. Assignee's endeavors to familarize itself with the needs of the area included the monitoring of local stations, encompassing the two Negro-oriented stations and various general outlet stations; discussions with more than fifty persons residing within the station's service area; and interviews with some twenty-two leaders of local organizations and institutions. The Commission fully considered the steps taken by assignee, as well as its overall program schedule, and held that the programming reflected a sufficient ascertainment of such needs. Appellant does not dispute that the Negro population of Washington, D.C. has unfulfilled broadcast needs or that assignee's programming is responsive to those needs. Instead, appellant's position is simply one of disagreement with the Commission's view that the course of action followed by assignee was a satisfactory one for obtaining information regarding the needs of the area to be served. But it is well settled that questions of this kind have been

committed to the discretion of the Commission. And the Commission acted well within its discretion in deciding that assignee had demonstrated a reasonable familarity with the programming needs of its service area and a good faith attempt to meet those needs.

B.

Similarly, the Commission properly rejected appellant's contention that a hearing was required to inquire into the public need for the new program service as compared to the need for the service to be lost. The bare claim which appellant made before the Commission that such a hearing was needed was unsupported by a single allegation of fact to show or even suggest that from a programming standpoint the assignment would not serve the public interest. On the basis of its review of the detailed showing as to the proposed programming set forth in the assignment application and the programming formerly carried on WOL, the Commission reasonably concluded that a grant of the assignment application would serve the public interest. No demonstration of error has been shown.

The statute provides that where a petition to deny is filed it must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. 47 U.S.C. 309(d)(1). Assignee had made an adequate showing of need for its new program service. Appellant's petition to deny did not contain any specific allegations of fact, as required by Section 309(d)(1) of the Act, to refute this showing or to establish an overriding need for the service to be lost. Under these circumstances, the Commission's denial of the request for a hearing on this matter was a clearly permissible exercise of its discretion.

ARGUMENT

I. THE COMMISSION ACTED WELL WITHIN ITS DISCRETION IN DECIDING THAT A GRANT OF THE ASSIGNMENT APPLICATION WOULD SERVE THE PUBLIC INTEREST.

Appellant argues that the Commission's approval of the sale of standard broadcast station WOL from the assignee to the assignor was contrary to the provisions of Section 309 of the Communications Act, 47 U.S.C. 309.[11/] In particular, appellant contends that the Commission erred in not holding an evidentiary hearing to resolve the following issues: (1) whether the assignee had sufficiently ascertained the programming needs and interests of the public residing within station WOL's service area; and (2) whether the need for the new service outweighed the need for the service to be lost.

Section 309(d) of the Communications Act provides for grants without hearing where the Commission finds, after consideration of the application and all relevant pleadings, that there are no substantial and material questions of fact outstanding and that a grant is in the public interest. The statute provides that where a petition to deny is filed, it must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. 47 U.S.C.

11/ The assignment of construction permits and station licenses is governed by the requirements of Section 310(b) of the Communications Act, 47 U.S.C. 310(b). This section provides, among other things, that the procedural provisions of Section 309 of the Act shall apply to assignment applications. Excerpts from Section 309 are set forth in appellant's brief (pp. 3-4), but in our view pertinent portions of Subsection (d) have been omitted. The complete text of Section 309(a)(d) and (e), as well as Section 310(b), are set forth as Appendix A hereto.

309(d)(1). But where the Commission finds that this showing has not been made, the petition to deny may be disposed of by "a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. 309(d)(2).

In amending the statute in 1960, it was the intent of Congress that petitions to deny filed under the new Section 309(d) should make:

> "* * * a substantially stronger showing of greater probative value than is now necessary in the case of a post grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, as is now possible with protests, are not sufficient. * * *" S. Rept. No. 690, 86th Cong., 1st Sess., p. 3.12/

Under the new law, the Commission was to "be guided by rules applicable to a motion for summary judgment rather than, as under the present protest procedure, to a demurrer." S. Rept. No. 690, 86th Cong., 1st Sess., p. 4.

Thus, Section 309(d), both by its terms and in light of the legislative history, reflects an intention by Congress that a hearing not be required in the absence of substantial factual allegations which,

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12/ The post-grant protest referred to was that provided for in the then Section 309(c), which gave the Commission little discretion. See Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563, cert. denied 350 U.S. 923 (1955), holding that what was required of a protest under Section 309(c) was "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience, and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding."

if true, establish a prima facie case for denial. In other words, where the material facts are not controverted and in the absence of unresolved legal or policy questions, no hearing is required. See also Capitol Broadcasting Co. v. Federal Communications Commission, 116 U.S. App. D.C. 370, 324 F.2d 402 (1963); Cf. Pan American Petroleum Corp. v. Federal Power Commission, 116 U.S. App. D.C. 249, 322 F.2d 999 (1963); Mississippi River Fuel Corp. v. Federal Power Commission, 108 U.S. App. D.C. 284, 281 F.2d 919 (1960), cert. denied 365 U.S. 827 (1961). As we shall show, appellant failed to raise any substantial or material questions of fact which would have required resolution by way of an evidentiary hearing and has not demonstrated that the Commission abused its discretion in holding that the public interest would be served by the grant of the assignment application.

A. The Commission Reasonably Concluded That Assignee's Endeavors To Ascertain And Serve The Programming Needs And Interests Of The Area Were Adequate.

In its application seeking consent to acquire station WOL, the assignee set forth in great detail its endeavors to determine the programming needs and tastes of the area. As part of this effort, the assignee monitored local stations, including the two Negro-oriented stations and various general outlet stations. Discussions were held with more than fifty persons residing within the station's service area. And some twenty-two leaders of local organizations and institutions were interviewed. On the basis of these studies and surveys, the assignee decided that there were unfulfilled broadcast needs in the area and thereafter specifically formulated its

programming to accommodate those needs. The Commission carefully considered the steps taken by assignee, as well as its overall program schedule, and held that the proposed programming reflected a sufficient ascertainment of such needs (R. 186).

Appellant contends that the Commission erred in granting the application without an evidentiary hearing, but has failed to show the existence of any factual issues which would warrant such a hearing. In its petition to deny, appellant did not dispute that the Negro population of Washington, D.C. has unfulfilled broadcast needs. Nor did it allege any facts tending to show that assignee's programming would not be responsive to the needs of the Washington area. Likewise, no such contention is made in its brief. Instead, appellant's position is simply one of disagreement with the Commission's view that the course of action followed by the assignee was a satisfactory one for obtaining information regarding the needs of the area to be served. Appellant seeks, in effect, to have this Court substitute its judgment in the matter for that of the Commission. But it is well settled that questions of this kind have been committed to the discretion of the Commission, 47 U.S.C. 309(a)(e), 310(b); Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 229 (1946). No abuse of that discretion has been shown.

The lack of substance to appellant's position that assignee has not sufficiently ascertained that a need exists for the kind of programming it proposed to broadcast is underscored by the fact that in a separate proceeding before the Commission appellant is presently contending that such a need does exist. That proceeding involves

appellant's application for renewal of license for station WUST, Bethesda, Maryland, and the mutually exclusive application of Bethesda-Chevy Chase Broadcasters, Inc. requesting authority to construct a new standard broadcast station in Bethesda. Appellant has requested a change in station WUST's location and transmitter site from Bethesda, Maryland to Washington, D.C., and in support, has contended that there was a vital need for an additional station to serve the Negro population in Washington, D.C. It pointed to alleged deficiencies in local news, particularly in areas of special interest to the Negro community; programming involving local organizations composed of Negroes or whose activities are of special interest to Negroes; programs involving talk, discussion and debates on public issues involving matters within the Negro community; programs providing opportunities for local Negro talent to gain access to the microphone; and Negro oriented musical shows.[13/] In short, the same kind of programming which the assignee found a need for, appellant, too, believes the community ought to have.

Appellant argues (Br. 8-16) that the assignee failed to comply with Commission standards governing the type of inquiries that an applicant must undertake to determine the broadcast needs of an area. Contrary to the implication of appellant's argument, however, the Commission has never held that inquiries as to program needs must conform to a set pattern. The principal requirement is that broadcasters be familiar with and attempt to meet the programming needs of their service area. Suburban Broadcasters, 30 F.C.C. 1021 (1961), aff'd. sub nom.

13/ A copy of the relevant portions of the pleading filed with the Commission in that proceeding is attached hereto as Appendix B.

Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1963); Report and Statement of Policy re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 20 Pike & Fischer, R.R. 1901 (1960). But Commission cases construing the 1960 program policy statment, including the present one, make it clear that the Commission "did not [intend to] set a rigid method by which an applicant must demonstrate that it has taken adequate steps to ascertain the needs and interests" of the area served by its station (R. 186). Cf. WGRY, Inc., 2 Pike & Fischer, R.R. 2d 718 (1964); Bootheel Broadcasting Company, 24 Pike & Fischer, R.R. 300 (1962). Rather, it recognized that there are various means of ascertaining such needs, and that considerable latitude should be granted the licensee.[14/]

At the time this assignment application was filed the application form did not require a specific showing of the manner in which the needs of the community had been ascertained, although Commission

14/ In the En Banc Programming Inquiry, supra, the Commission said: "We do not intend to guide the [applicant] along the path of programming; on the contrary; the [applicant] must find his own path with the guidance of those whom the signal is to serve." Along this line, the Commission also emphasized that a broadcaster should in good faith make a continuing effort to ascertain and serve the needs of the persons residing within his service area. Consistent with this policy the Commission has recognized a number of means whereby familiarity with the needs and interests of the area to be served could be acquired. For example, long term residence in the community, Pinellas Radio Co., 24 Pike & Fischer, R.R. 300 (1962); consultations with leaders of local civic organizations, WGRY, Inc., 2 Pike & Fischer, R.R. 2d 718 (1964); broadcast experience on local stations, Denis A. Sleighter and Willard D. Sleighter (WWDS), FCC 65 R-269 (released July 20, 1965); and diversified community studies by non-residents, ABW Broadcasters, Inc., 1 Pike & Fischer, R.R. 2d 65 (1963) have been held to be proper components of adequate studies of the broadcast needs of a particular community. Cf. Community Telecasting Corporation v. Federal Communications Commission, 115 U.S. App. D.C. 181, 317 F.2d 592 (1963).

practice was to inquire into the matter on a case to case basis where circumstances appeared to warrant it. Since November, 1965, assignees have been required to state "the methods used by the applicant to ascertain the needs and interests of the public served by the station. Such information shall include (1) identification of representative groups, interests and organizations which were consulted and (2) the major communities or areas which applicant principally undertakes to serve." AM-FM Program Form, Pike & Fischer, R.R. 98:45; 98:51 (Current Service). At the time the new form was adopted, the Commission stated that it expected "broadcast permittees and licensees to make a positive, diligent and continuing effort to provide a program schedule designed to serve the needs and interests of the public in areas served by the station. The efforts must include consultation with the general listening public, and with leaders in community life and professional and eleemosynary organizations." AM-FM Program Forms, 30 Fed. Reg. 10195, 10196, 5 Pike & Fischer, R.R. 2d 1773, 1777 (1965). Once again the Commission stressed that what is required is a "good faith effort" to ascertain community needs.

Here there is no question that such an effort has been made. As pointed out above, initially, interviews were conducted with members of the general public and the programming of other stations in the area was monitored and studied. Following the

preparation of a program proposal, interviews were conducted with leaders of many community organizations (R. 9-16).[15/] Contrary to appellant's assertion (Br., p. 12), these conversations resulted in adjustments in the proposed program schedule (R. 18-19). For example, particular programs proposed to be broadcast on Sundays were amended to provide specifically for the participation of the Washington Chapters of the National Association For The Advancement of Colored People,[16/] the Congress of Racial Equality, the Washington Urban League, the Legal Aid Society and Howard University (R. 18). Furthermore, assignee indicated that it would maintain a flexible program schedule so that various other local groups could also obtain broadcast time on WOL (R. 11-16). Certain minor changes in the classifications and percentages of the program proposal were also made in this amendment (R. 149).

15/ For these reasons, appellant's reliance on Louisiana Television Corporation v. Federal Communications Commission, __ U.S. App. D.C. __, 347 F.2d 808 (1956) and Wometco Enterprises, Inc. v. Federal Communications Commission, 114 U.S. App. D.C. 261, 314 F.2d 266 (1963) is misplaced. In those cases, the applicants made no showing whatsoever regarding their efforts, if any, to determine and fulfill the programming needs of their service areas. In each case, the Court held that this issue, as well as a number of others raised by objecting parties, should have been the subject of a hearing. Those situations are in sharp contrast to the detailed showing made by the assignee in this case. Since the record clearly shows the efforts of assignee to determine the broadcast needs of its service area, a hearing in this case would serve no useful purpose. Likewise, appellant's reliance on Saul M. Miller, 5 Pike & Fischer, R.R. 2d 880 (1965) and Higson-Frank Radio Enterprises, 2 Pike & Fischer, R.R. 2d 755 (1964) is not appropriate here. In those cases, unlike the situation here, the applicants took no steps prior to the filing of their applications to gain a familiarity with the needs of the community they intended to serve.

16/ Assignee noted that WOL would be the only local Negro-oriented station carrying a weekly show for the NAACP in the Metropolitan Washington area (R. 10).

In this connection, appellant seems to suggest (Br. 14) that the offering of free program time to representatives of local organizations detracts from assignee's showing. To the contrary, cooperation with public officials and local civic, educational and religious organizations is a positive factor which strengthens assignee's overall position. Indeed, the making available of time, without charge, so that different local groups can gain access to the microphone to present their views is a valuable public service, which the Commission has consistently commended. See, e.g., Johnston Broadcasting Co., 3 Pike & Fischer, R.R. 1784 (1947), rev'd. on other grounds sub nom. Johnston Broadcasting Co. v. Federal Communications Commission, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

In sum, assignee, an experienced broadcaster in the area of specialized programming, monitored local stations and discussed the broadcast needs of the area with over fifty persons residing in WOL's service area prior to the submission of its program proposals. Thereafter, assignee's consultations with leaders of major community organizations and institutions confirmed its judgment that there were unfulfilled needs and that its programming was responsive to these needs. Furthermore, as a result of these interviews, assignee amended its application to reflect specific programs involving the local groups who expressed a need to be heard. This kind of a showing is clearly consistent with the Commission's policy with regard

to licensee responsibility in the field of programming. Since there were no factual allegations giving rise to a dispute as to the material facts in this matter, the Commission acted well within its discretion in deciding that assignee had demonstrated a reasonable familiarity with and attempt to meet the programming needs of its service area.

B. Appellant Failed To Allege Facts Sufficient To Warrant A Hearing To Inquire Into The Public Need For The New Program Service As Compared To The Need For The Service To Be Lost. The Commission's Decision Rests On An Adequate Factual Basis.

Appellant contends that the Commission erred in not designating the assignment application for hearing to inquire into the public need for the proposed new program service as compared to the need for the service to be lost. However, the bare claim which appellant made before the Commission that such a hearing was needed was unsupported by a single allegation of fact to show or even suggest that from a programming standpoint the assignment would not serve the public interest (R. 141-142). We shall show that on the basis of the facts before it, the Commission could well find that a grant would be in the public interest and that under the terms of Section 309(d) and (e) appellant was not entitled to a hearing on the question.

The programming formerly broadcast over station WOL was set forth in the assignor's last license renewal application for that station, which was granted by the Commission on September 24, 1963. As appellant suggested (R. 142), the station presented

a program format designed to attract the general listening public, utilizing, among other things, the facilities of the Mutual Broadcasting System. The Commission also had before it a detailed showing as to the program service proposed by the assignee. This showing included the proposed program schedule for a typical week of operation (R. 93-104, 18-20); an analysis of the schedule as to the percentage of time devoted to various types of programs, such as entertainment, religious, educational, news, discussions and talks (R. 65); a similar analysis as to the source for such programs, that is, whether the programs would be commercial or sustaining, network, wire or live (R. 66); a narrative exhibit describing the nature and objectives of the proposed new programming service (R. 107-108); and an amendment which detailed the various efforts undertaken by assignee to ascertain and fulfill the program needs of the area (R. 9-16). On the basis of its review of these submissions and the programming formerly carried on WOL, the Commission found that some of the programming (e.g., Mutual Network shows) will be continued by the assignee (R. 187), and that many other stations serving the Washington area carry programming similar to that which was being broadcast over WOL (R. 187). The Commission further noted that no member of the listening public has protested the widely-publicized change in WOL's program format. (R. 187.)

We believe there can be no question as to the reasonableness of the Commission's determination that a grant of the application would serve the public interest. For the reasons discussed

in Part A, supra, it is clear that the assignee's proposed new service would be responsive to substantial needs and interests within the community (R. 186). Only two stations (excluding WOL) - out of a total of thirty-two aural broadcast facilities serving Washington, D.C. and its environs - direct their programming in particular to Negroes in the listening audience. The station will, therefore, provide a needed additional local outlet for approximately 549,100 Negro persons residing in the metropolitan Washington area. Furthermore, any diminution in the kind of programming formerly offered by WOL is clearly unsubstantial from a public interest standpoint in view of the large number of stations which, as the Commission found, offer similar programming. In this connection, it should be noted, too, that the assignee's proposed broadcast schedule consists of many programs, including public service programs involving community organizations (e.g., Legal Aid Society, Social Security Administration, District of Columbia Council of Churches) which are not limited in appeal to the Negro listeners, but rather are of interest to the entire community.

Moreover, it is well settled that broadcast licensees have wide latitude in the selection of programming. The Commission in administering the Act, and the courts in interpreting it, have consistently maintained that subject to the broad public interest standard of the Act, and except for specific statutory prohibitions as to obscenity, lotteries, etc., responsibility for the selection and presentation of broadcast material ultimately devolves upon

the individual station licensee.[17] Thus, if there were no assignment involved but instead the incumbent licensee decided to change the format of the station to what is being proposed by the assignee here, there would be no question as to his right to do so in view of the demonstrated need for this kind of service. Commission policy simply requires that the agency be notified of the change. See Pike & Fischer, R.R. 98:46 (Current Service); KORD, Inc., 21 Pike & Fischer, R.R. 781, 785 (1961).

It is apparently appellant's position that, notwithstanding the foregoing, a hearing is nevertheless automatically required in instances of this kind. Clearly, however, this is not the case. It is well settled that where, as here, the petition opposing the grant lacks "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent

17/ For example, the Commission has stated that: "The ascertainment of the needed elements of the broadcast matter to be provided by a particular [applicant] for the audience he is obligated to serve remains primarily the function of the [applicant]. His honest prudent judgment will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the [applicant]." En Banc Programming Inquiry, supra, 25 Fed. Reg. at 7295, 20 Pike & Fischer, R.R. at 1913-1914. See also McIntire v. William Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (C.A. 3, 1945); Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (C.A. 1, 1950); Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470,475, (1940). In the McIntire case, the Court stated: "It is clear from history and interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC" (151 F.2d at 599) and that ". . . Congress has conferred the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations." (151 F.2d at 600). See also 47 U.S.C. 326.

with [the public interest, convenience and necessity]" no hearing is needed. 47 U.S.C. 309(d)(1). In other words, in the context of the particular issue raised by appellant, the petition must allege specific facts sufficient to show some public injury, i.e., the need for the service to be lost outweighs the need for the new service. The statutory standard governing petitions to deny and the scope of the Commission's authority in treating such petitions were recently considered in Southwestern Operating Company v. Federal Communications Commission, __ U.S. App. D.C. __, __ F.2d __, (Case No. 19,061, decided September 27, 1965) where this Court stated (Slip Op. 2-3):

> ". . . we have no doubt that Congress intended to vest in the FCC a large discretion to avoid time-consuming hearings in this field whenever possible 2/ and we would ordinarily defer to that purpose . . . "

2/ In 1960 Congress amended the Communications Act in respect of the procedure provided for contesting applications for licensing authority. 74 Stat. 889, amending 47 U.S.C. §309. It created the device of a petition to deny, which must be filed in advance of hearing and, indeed, made it clear that no hearing need be held if that petition failed to "contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity] . . ." 47 U.S.C. §309(d)(1). If "there are no substantial and material questions of fact and . . . a grant of the application would be consistent with [the public interest] . . ." the petition shall be denied and the grant made without hearing. 47 U.S.C. §309(d)(2) . . .

Although the Southwestern case involved an economic injury issue, the Court noted that "these more rigorous pleading requirements" formulated by Congress in 1960 apply equally to other types of

issues raised in petitions to deny (Slip Op. p. 3, n. 2).

Here appellant completely failed to satisfy the standard of pleading necessary to warrant the relief requested. In its petition to deny, appellant merely made the conclusory statement that a hearing was required to resolve the question posed. But the petition contained no facts to refute assignee's showing of need for the new service or to establish that the public would be adversely affected by the substitution of service. In short, appellant did not present any factual allegations which, if true, would establish a prima facie case for denial of the assignment application. Likewise, in its brief, appellant merely reiterates its view that a hearing was required but it makes no factual showing whatsoever to demonstrate that the Commission erred in granting the application. Since appellant "made no proffer of evidence to be evoked which would have impaired the validity of the Commission's determination," it should not now be permitted to complain that the Commission improperly denied its request for a hearing on this matter. Southland Television Company v. Federal Communications Commission, 105 U.S. App. D.C. 282, 284, 266 F.2d 686, 688 (1959).

Appellant's position is thus, in effect, reduced to the argument that whenever an assignment application is filed presenting a change in the existing program format of a station, the Commission is required to hold an evidentiary hearing on the application. Not only is this position contrary to the legislative intent as expressed in Sections 309 and 310(b) of the Communications Act,

but it is also logically unsound. No public interest purpose would be served by holding hearings on virtually all assignment applications where, as in this case, the application and related pleadings provide an adequate basis for finding that a grant of the application would serve the public interest.[18/] To hold otherwise would merely place an undue hindrance on persons desiring to dispose of their broadcast interests, and in many instances, would forestall the commencement of a much-needed new program service. Under the circumstances of this case, the Commission's denial of the request for a hearing was a clearly permissible exercise of discretion.

Appellant's reliance (Br. 7-8) on cases involving mutually exclusive applications for radio stations on the same frequencies in different communities and applications for new broadcast facilities which would cause objectionable interference to an existing station is misplaced. Those cases involve competiting parties who had a well-established statutory right to a hearing on grounds other than those involved in this case.[19/] The main question in choosing between the mutually exclusive applications was which community had a greater need for a broadcast facility. In the interference cases the question was whether the need for the proposed new service overrode the need for the service to be lost through interference. But none of the cited cases involved a comparative evalua-

18/ During the 1964 fiscal year, the Commission granted 591 assignment and transfer applications involving standard broadcast stations without hearing and designated only three such applications for hearing. Federal Communications Commission, 30th Annual Report, p. 81 (1964).

19/ See 47 U.S.C. 307(b), 309; Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1946) (mutually exclusive applications); and 47 U.S.C. 309, 316; Federal Communications Commission v. National Broadcasting Co. (KOA), 319 U.S. 329 (1943) (objectionable interference to an existing station).

tion based on the nature of the programming of the parties involved in the proceedings and, therefore, the cases have no relevance here. In fact, in the Eastside Broadcasting Co., 3 Pike & Fischer, R.R. 2d 505, 508 (1964), cited by appellant, the Commission emphasized that consistent with its general policy a programming issue would be added only upon a proper factual showing that programming evidence may be of decisional significance. No such showing was made by appellant in this case. Thus, the very cases cited by appellant support the Commission's determination here that a hearing on this question was not required.

In sum, the Commission properly determined that no substantial and material questions of fact were presented requiring resolution by the means of an evidentiary hearing and that a grant of the assignment application would serve the public interest. No demonstration of error has been shown.

CONCLUSION

It is submitted that appellant has failed to show that the Commission's Memorandum Opinion and Order is arbitrary, capricious or otherwise erroneous. The opinion should therefore be affirmed.

Respectfully submitted,

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

RONALD A. SIEGEL,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

December 13, 1965.

APPENDIX A

Section 309(a), (d) and (e) of the Communications Act of 1934, as amended.

Sec. 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

Sec. 309(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

Sec. 309(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Sec. 310(b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

APPENDIX B

WUST Washington Application
Exhibit No. 1

REQUEST FOR WAIVERS

By this application, the Atlantic Broadcasting Company (WUST) seeks from the Commission (a) a change in the city designation of station WUST from Bethesda, Maryland, to Washington, D.C., and (b) a construction permit to change transmitter location and to install a new antenna and ground system. To make possible a grant of this application, the Commission will have to waive the provisions of Sections 1.354(Note), 3.25(a)(5)(ii), and 3.188(b)(2) of its Rules, and those waivers are here requested.

* * * *

The Need

The need involved here is the need of the Negro community of Washington, D.C., and its environs. That community numbers more than 475,000. It is complex - containing within it all the social, economic and cultural variables to be found in any community of similar size anywhere in the United States. Thus, it is a community having all the broadcasting needs and interests which are to be found in communities of like size. To be sure, the fundamental broadcasting needs and interests of the Washington Negro community are identical with the needs and interests of the entire population of the area, and it ought to follow that the needs and interests of the Negro population are being served in the same degree as the needs and interests of the entire community. Regrettably, that does not follow, and the result is that there are substantial needs and interests which remain unfulfilled.

1. There is a great need for more local news, specifically for news of events taking place within the Negro community or which are of special interest to the Negro community. This need might be

met by the various news media in the area, but it is not, and a noticeable void is thereby created. The extent of this void is most strikingly illustrated by the Washington Afro-American. Each edition of that newspaper is crammed with news items which are of major interest to various elements in the Negro community, but which are given no attention in other media. But, while the "Afro" thus strives to fill the void, it is published only twice each week, it reaches only a limited audience, and it can do no more than to meet a small part of the total need.

2. Organizations of Negroes, and organizations whose activities are of special interest to Negroes - including civic, cultural, educational, charitable and religious groups - exist in great number in the Washington area, and they have a huge unfulfilled need for access to radio stations, both as outlets for information about their activities and as media for expression of their ideas.

3. Public issues involving matters either within the Negro community or of special interest to Negroes do not receive adequate attention. There is, therefore, a significant need for radio programs composed of talk, discussions and debates on such matters.

4. There is a manifest interest among Negroes in music which is composed and performed by Negroes, and there is a particular interest in music of the popular gospel variety for the reason that many people, including Negroes in large number, derive religious

inspiration from it. Not enough of these classes of music is now broadcast in the Washington area. At the same time, there is a need to provide greater opportunities for local Negro talent to reach substantial audiences through radio.

There is, of course, some effort being made to meet these needs, but they remain inadequate. Two existing stations conduct their operations so as to attract, and therefore to serve, the Negro community. One is station WOOK, the other is WUST. WOOK is licensed to Washington, where the bulk of the Negro population resides, while WUST is licensed to Bethesda. WOOK operates both day and night, while WUST is limited to daytime-only operation. WOOK has operating power of 1,000 watts during daytime hours, while WUST is limited to 250 watts. WOOK places a useable signal within the reach of virtually all the Negro population in the metropolitan area, while WUST reaches only 250,712 as compared with the 475,804 it would reach under this proposal. WOOK is owned in common with station WINX, Rockville, Maryland, and the two stations are sold in combination, while WUST has no such opportunity. The highest spot announcement rate for WOOK is $13.50, and the highest rate for WOOK and WINX in combination is $16.75, while the comparable rate for WUST is $6.60.

WUST is anxious to make it understood that it is not here complaining of an unfair competitive disadvantage. Rather, it offers

the foregoing facts only to show that a community of 475,000, having needs of such magnitude that it ought to be served by five or six AM stations, is now being served in whole by only one station, while a second station serves it only in part. The Commission has often held that, second only to the need for a first local facility, the greatest need in each substantial community is for its first local competitive facility - a second station which can not only meet needs and interests not wholly fulfilled by the first station but, by providing local competition, can also cause improved service to the public by both stations. WUST has for many years sought to occupy that role, but it has been badly hobbled in its efforts for, as the facts set out above show so clearly, it is far less than an equal competitive facility. Even with the changes proposed herein, WUST will remain well below the competitive level of WOOK. Still, if the Commission will grant this application, it will provide WUST a materially greater opportunity to meet the unfulfilled needs and to stimulate more intensive competition in overall service to the Negro community.

If this application is granted, WUST will act immediately to modify its operation so that (1) a majority of its news programs are devoted to local news, (2) there are regularly scheduled daily programs of talks and discussions on public affairs, (3) greater opportunities are provided for the use of the station's facilities

by community organizations, (4) the station can present timely and intelligent analyses of important local news breaks, (5) arrangements can be made quickly for special programs on public affairs when the need arises, (6) new efforts can be made to develop instructive programs in cooperation with educational authorities, and (7) the advice of community leaders can be sought and can be applied to improve the station's service to the community. For those purposes, WUST will employ a full-time director of news and public affairs. No effort will be spared to find a person qualified to manage those activities with competence and imagination and, at the same time, to search for and to recommend new and more effective ways to meet the needs of the community in those fields. In addition, WUST will promptly increase the opportunities it has been providing for the development of local talent, and will seek new ways to provide needed services for children and young adults.

Yet another need, and one which is regarded by many community leaders as the most critical, is the need for more communication between the Negro and the White communities. The views, the aspirations, the sensibilities, the frustrations, and the needs of each of the two groups must be heard, and must be given greater attention, among the people of the other. Should this application be granted, WUST would not only serve a substantially greater portion of the Negro population, but would also serve a significantly

larger portion of the population of the entire Washington area. See Engineering Report, Exhibit No. III, Figure 8. Given that larger audience, WUST will have the means by which to contribute to increased interracial communication and will undertake to do so in every way it can - with the hope that the more that communication is increased the more the members of the two groups will come to regard each other as members of a single, unified, color-blind society.

WUST is a strong and unwavering supporter of all efforts for the elimination of racial barriers, and its facilities will always be available to advance those efforts, with as much intolerance for hate and violence as it has for procrastination among those who resist those efforts. WUST does not, and will not, do anything which serves to perpetuate racial division, or to heighten or sharpen differences among racial groups, or to portray an inaccurate or demeaning image of Negroes. Indeed, WUST is very much aware that the pressing needs it seeks to serve ought not to exist, and would not exist if all existing broadcasting facilities were required to meet all the needs of all the people of this area. But they are not, and, as we have said, a void is thereby created. WUST has been working to fill a part of that void, and by this application seeks the means by which it can do much more, but it will always lend its support to the work of insuring that the time will come when the needs and interests of Negroes and other racial and ethnic groups

are met in the same manner and in the same degree as the needs and interests of the entire community are met.

WUST has not undertaken to present here the mass of data and information which is available to support the facts recited above, for it believes that the existing needs are fairly apparent. However, if the Commission finds that it is unable to grant this application without a hearing, WUST stands ready to prove in meticulous detail the existence and the genuineness of each of the needs, and the means by which a grant of this application will make possible a filling of those needs.

In acting upon prior requests for waiver of the "AM freeze", the Commission has emphasized that it has fulfilled its obligation to examine carefully the merits of each individual case. Memorandum Opinion and Order, FCC 63-35, released January 11, 1963. WUST believes that if the same careful consideration is given to this proposal the Commission will conclude that the public need to be served is great enough to justify the waivers requested, or, at the least, to warrant giving this applicant a hearing on its proposal.

June 26, 1963

BRIEF FOR INTERVENOR WOL, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,603

ATLANTIC BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

WASHINGTON BROADCASTING COMPANY, WOL, INC.,

Intervenors.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Federal Communications Commission erred in concluding, without a hearing, that the assignee had ascertained the needs and interests of the community to be served.

2. Whether the Commission erred in concluding, without a hearing, that the assignee's proposal, which included changes in the program service of station WOL, would serve the public interest, convenience and necessity.

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BRIEF FOR INTERVENOR WOL, INC.

COUNTERSTATEMENT OF THE CASE

Appellant's cursory statement of the case is incomplete and it is respectfully submitted that the following statement of the material facts in the case would be of assistance to the Court.

This is an appeal filed pursuant to Section 402 (b) (6) of the Communications Act of 1934, as amended, 47 U.S.C. 402 (b) (6), from a Memo-

randum Opinion and Order of the Federal Communications Commission, released on July 12, 1965 (R. 185-188), which granted the application for consent to the assignment of Stations WOL and WOL-FM, Washington, D. C., from Washington Broadcasting Company to WOL, Inc. and which denied the Petition To Deny filed by Atlantic Broadcasting Company against the assignment of Station WOL.

The applications for Commission consent to assignment of licenses of Station WOL and associated Station WOL-FM, Washington, D. C., from Washington Broadcasting Company to WOL, Inc. were filed on April 8, 1965. (R. 1.) The assignee proposed, and is presently broadcasting, well-balanced programming with special emphasis upon serving the needs of the large number of Negro citizens residing within the stations' service areas. (R. 65-66; 93-108.)

In the assignment applications, WOL, Inc., whose principals have gained wide experience in the operation of other stations which also emphasize programs designed to serve the needs of Negro citizens, stated its judgment as to the type of programs which would fulfill those needs, i.e. programs which present entertainment, news and public service material of particular interest to the Negro citizens in the District of Columbia area. (R. 107-08.) Such a station, WOL, Inc. stated, must act as a voice for the community by presenting programs in conjunction with various groups, such as civil rights organizations, whose views and activities are of particular interest to Negro citizens. (R. 107-08.)

In a supplemental amendment to the applications, filed May 21, 1965, WOL, Inc. set forth in detail the various steps it had taken to ascertain the program needs and interests of the public within WOL's service area. (R. 9-19; 146.) These efforts included: monitoring of local stations, encompassing both of the two other local Negro oriented stations, plus the other general outlet stations, to determine how the needs of the Negro residents in the District of Columbia could be most fully met; more than fifty separate discussions with individual Negro residents in

the Washington area, who, practically without exception, indicated a real need for the programs proposed; and interviews with twenty-two leaders of various Washington civic organizations including the Washington Chapter of The National Association for the Advancement of Colored People, Howard University, the local unit of The Student Non-Violent Coordinating Committee, *Spotlight* magazine, The Methodist Ministerial Conference, District of Columbia Council of Churches, Federation of Civic Associations, the local branch of The Social Security Administration, the Washington Chapter of The Congress of Racial Equality, the local Legal Aid Society, Better Business Bureau of Metropolitan Washington, the Washington Chapter of The Urban League, and The Capital Press Club. These interviews with community leaders were planned and commenced prior to the filing of appellant's Petition To Deny and comprised discussion as to program needs, the extent to which such needs were then unfulfilled, specific proposed programs as well as the programming in general, and the means by which these various organizations and WOL, Inc. would cooperate so as to most effectively present specific programs of interest and merit. (R. 9-19.)

On May 17, 1965, appellant, the licensee of standard broadcast Station WUST, Bethesda, Maryland, filed a Petition To Deny directed toward the assignment application of WOL. (R. 136-145.) Appellant based its claim of standing upon the grounds that although WUST is licensed to serve Bethesda, the station has for many years been operated so as to serve the Negro population of Washington, D. C., and its environs, and that the proposed operation of WOL would be in direct competition with Station WUST. (R. 136-137.) In its Petition To Deny, appellant contended, insofar as is pertinent here, that WOL, Inc.'s efforts to ascertain program needs were insufficient, and that a hearing was required in order to determine the need for WOL, Inc.'s proposed program service. (R. 137-142.) WOL, Inc. filed an opposition to the Petition To Deny, and appellant submitted a reply pleading. (R. 150-165; 166-177.)

In a Memorandum Opinion and Order adopted July 7, 1965, the text of which was released July 12, 1965, the Commission denied appellant's Petition To Deny in its entirety, and granted consent to the assignment of both WOL and WOL-FM (R. 185-188). On July 9, 1965, pursuant to Commission authorization, the assignment of both stations was effectuated, and WOL, Inc. has been operating both stations since that date.

Appellant filed its Notice of Appeal on August 10, 1965, and a Motion for Stay was filed on August 20, 1965, by appellant. Appellant's Notice of Appeal and Motion for Stay, as was its Petition To Deny, are directed solely to grant of the assignment of WOL, and the assignment of WOL-FM is not challenged by appellant. Appellant's Motion for Stay was denied by the Court on September 24, 1965. [1]

STATUTES INVOLVED

Communications Act of 1934, as amended:

> **Section 309(a)** Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application. 74 Stat. 889, U.S.C., Title 47, Section 309(a).
>
> **Section 309(d)(1)** Any party in interest may file with the Commission a petition to deny any application . . . at any

[1] It should also be noted that on November 26, 1965, appellant filed with the Commission a document entitled "Petition For Reconsideration, Request For Late Acceptance, and Motion For Expedited Consideration," and a Supplement to this document was filed by appellant on December 3, 1965. An appropriate pleading has been filed in response thereto by WOL, Inc.

time prior to the day of Commission grant thereof without hearing . . . 74 Stat. 890, U.S.C., Title 47, Section 309(d)(1).

Section 309(d)(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition . . . If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e). 74 Stat. 891, U.S.C., Title 47, Section 309(d)(2).

Section 309(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . 74 Stat. 891, U.S.C., Title 47, Section 309(e).

SUMMARY OF ARGUMENT

WOL, Inc. submitted to the Commission a detailed programming showing including the assignee's efforts to determine program needs, the programming which was proposed, and the need for such programming, and the manner in which the public interest would thus be served. In contrast, the appellant's pleadings were bereft of factual allegations.

The Commission, which has never established any rigid formula as to the way in which program needs may be ascertained, properly concluded that WOL, Inc.'s efforts in this regard were adequate to meet its responsibilities and that grant of the application would serve the public interest, convenience, and necessity.

ARGUMENT

I.

The Commission Reasonably and Properly Concluded That Assignee's Efforts To Ascertain and Serve the Programming Needs and Interests of the Area Were Sufficient.

Appellant's principal contention (Br. 8-16) is that the Commission erred in concluding that WOL, Inc. had sufficiently ascertained the needs and interests of the community to be served and that no evidentiary hearing was required. Appellant's argument is basically one of disagreement with the survey methods which were employed by intervenor. Thus, appellant does not dispute that the Negro population of Washington has unfulfilled program needs. Nor does appellant in any way suggest that WOL's programming, under its new ownership, does not serve to fulfill those needs. Indeed, appellant does not question any of the substantive matters relating to intervenor's programming. In this connection, it should be noted that inasmuch as appellant's station also broadcasts particularly for the Negro audience in the District of Columbia area, appellant's survey of community needs apparently led it to the same conclusion reached by intervenor.[2] Hence, appellant's quarrel is not with conclusions or results but solely with methodology.

Contrary to the implication of appellant's argument, however, the Commission has never decreed that inquiries as to program needs must conform to a set pattern. Thus, in the Memorandum Opinion and Order under appeal herein, the Commission said, (R. 186):

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[2] It should also be noted that there is pending before the Commission an application tendered for filing on June 28, 1963, by Atlantic Broadcasting Company to change the city designation of Station WUST from Bethesda, Maryland, to Washington, D. C. and to change the WUST transmitter site to a downtown location in Washington. In that application appellant asserts that there is a vital need for an additional station to serve the needs of the Negro population of Washington.

> "As we have stated on several occasions, our report on *En Banc Programming Inquiry, supra,* did not set a rigid method by which an applicant must demonstrate that it has taken adequate steps to ascertain the needs and interests."

The Commission thus recognizes that varying conditions and circumstances inevitably result in differing methods, and that diverse means may be acceptable.

The studies and surveys upon which WOL, Inc. relied were as follows: Commencing in January, 1964, a representative of the assignee, Mr. Frank Ward, an experienced broadcaster who is General Manager of Radio Station WWRL, New York City, another wholly-owned subsidiary of Sonderling Broadcasting Corporation, visited Washington, D. C., for the specific purpose of surveying the District of Columbia Negro community. (R. 9.) During these occasions Mr. Ward monitored the two Negro oriented radio stations whose signals are heard in the Washington, D. C., area, as well as the local general outlet stations, so as to determine how the needs of Washington's Negro population could best be met. (R. 9.) In addition, during these visits Mr. Ward discussed the needs of Washington's Negro community with more than fifty Negro citizens in the area. (R. 15.) Almost without exception, those interviewed indicated a real need in the Washington area for the type of programming proposed by the assignee. (R. 15.)

It is also highly significant that WOL, Inc.'s efforts concerning program needs did not cease with the filing of the applications, but have been and will be continuing in nature. Thus, subsequent to the filing of its applications but prior to the filing of the Petition To Deny, the assignee had arranged for meetings with a number of community leaders active in Washington civic organizations. (R. 9-10.)[3] These inter-

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[3] The civic organizations whose officials were contacted are set forth in the *Counterstatement of the Case, supra.* (R. 10-16.)

views comprised discussion as to program needs, the extent to which such needs were then unfulfilled, specific proposed programs as well as programming in general, and the means by which the various organizations and WOL, Inc. could cooperate so as to most effectively present specific programs of interest and merit. (R. 10-16.) The sum total of these interviews served to confirm that many of the program needs of residents of the Washington area, particularly these of Negro residents, were not fulfilled and that WOL, Inc.'s programming would serve to help fill those needs.

In addition to confirming and corroborating WOL, Inc.'s judgment as to its proposed programming, the interviews with community leaders resulted in the amending of the assignee's program proposal so as to provide for the specific participation of certain of the civic organizations contacted. (R. 18; 103.) For example, the program proposal was amended to provide for the direct participation of the Washington Chapters of The National Association for the Advancement of Colored People (NAACP); The Congress of Racial Equality (CORE); The Urban League (WUL); The Legal Aid Society, and Howard University. (R. 18; 103.) The amendment also encompassed minor changes in the classifications and percentages of the assignee's program proposal. (R. 66; 149.)

Upon consideration of these various efforts, the Commission properly concluded that WOL, Inc. had met its responsibilities.[4] The Commission also specifically noted that the assignee had found favorable response to its proposed programming changes and that the Commission had received no complaint from the listening public about these changes, which received wide publicity in the local press. (R. 186.) The Commis-

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[4] Appellant's reliance on *Louisiana Television Broadcasting Corporation v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 347 F.2d 808 (1965), is clearly misplaced since in that case the applicant had made no showing whatsoever regarding efforts to determine and fulfill program needs, whereas here WOL, Inc. submitted a full and detailed showing with respect thereto.

sion further noted that the assignee's experience in Negro oriented programming in other areas, the fact that several hundred thousand Negroes live within the WOL service area, and the monitoring of other local stations can serve to supplement the findings of the survey. (R. 186.)

The Petition To Deny, it should be emphasized, was completely devoid of factual allegations and was devoted instead to conjecture and speculation. In denying the Petition, the Commission was clearly acting in accord with Sections 309(a) and 309(d) of the Communications Act of 1934, as amended, and with prior Commission precedent, cf., *WGRY, Inc.*, 2 Pike and Fischer RR 2d 718 (1964); *ABW Broadcasters, Inc.*, 1 Pike and Fischer RR 2d 65 (1963), and *Pinellas Radio Co.*, 24 Pike and Fischer RR 300 (1962), wherein it was stated at page 302:

> "Such an issue (i.e. ascertainment of needs issue) has not and will not be added, however, where the petitioner alleges no facts in support of an assertion that an applicant may not have ascertained the needs or interests of the community or where the applicant clearly establishes that an investigation of community programming needs was made."

Here, the petitioner (appellant) had presented no facts, an adequate ascertainment of needs had been made, and the Commission thus properly denied the Petition.

II.

The Commission Properly Concluded That Grant of the Application Would Serve the Public Interest, Convenience and Necessity.

Appellant also contends (Br. 6-7) that the Commission was required to hold an evidentiary hearing to determine whether the programming proposed by the assignee, including the changes contemplated, would serve the public interest, convenience, and necessity. It should first be emphasized that in reaching its determination the Commission had

before it a detailed showing as to the program service proposed by WOL, Inc. The showing included the following: a proposed program schedule for a typical week of operation, listing the program titles and times for broadcast (R. 93-104; 18-20); an analysis of the schedule as to the percentages of time devoted to the various types of programs, such as entertainment, religious, educational, news, discussion, and talks (R. 65); a similar analysis as to the sources for such programs, i.e. whether the programs would be live, recorded, network, or wire and whether they would be commercial or sustaining (R. 66); a narrative Exhibit (No. XIII) further describing the nature of its proposed programming, and the objectives which the assignee proposed to achieve (R. 107-108); and the aforementioned Exhibit No. XXI which detailed the various efforts undertaken by WOL, Inc. to ascertain program needs and which demonstrated that the assignee's proposed programming would in fact help to fulfill certain such needs (R. 9-17).

In sharp contrast to the full and detailed showings submitted by WOL, Inc., the appellant's pleadings before the Commission were completely barren of factual allegations. Thus, appellant has never alleged that there was no need for the type of programming proposed by WOL, Inc. Nor did appellant ever allege any need for the continuation on WOL of the type of general programming previously carried by the assignor. Most significantly, appellant has never contended, much less supported by factual allegations, that the assignee's proposed programming would not serve the public interest. Indeed, since appellant's station WUST, although licensed to Bethesda, Maryland, has for many years been operated so as to serve the Negro population of Washington, D. C. and its environs, appellant apparently believes that such programming does in fact serve the public interest.[5] Appellant is thus in the anomalous posi-

[5] As noted, *supra*, the appellant herein, in seeking Commission approval to move its Station WUST from Bethesda to Washington, has taken the position that there is a great and urgent need for an additional Washington station to specialize in serving the needs of Negro citizens in the District of Columbia.

tion of contending that a hearing should be held to establish the very premise (i.e. that programming designed especially to serve the Negro population of Washington, D. C. is in the public interest) upon which appellant has for many years based its own programming service.

It is thus clear that appellant had raised no substantial and material question of fact, nor had appellant presented any reason why grant of the application would not serve the public interest. The need for the new service which the assignee proposed was amply demonstrated. In this connection, it should be pointed out that although WOL, Inc.'s programming features programs having special appeal for Negro listeners, the appeal and interest in such programs would by no means be limited to such listeners. Programs featuring civil rights organizations and activities, for example, are of widespread interest among all groups. Programs involving the Legal Aid Society and Howard University are certainly not restricted in appeal to any particular ethnic or racial group. Nor are the Mutual Network programs which are included in WOL, Inc.'s schedule so limited. A multiplicity of other stations licensed to Washington, D. C. provide listeners with the general type of program service previously carried by the assignor. The assignee's proposal furthers the often-stated Commission goal of providing the public with the widest possible diversity of service. Moreover, in passing upon program proposals, the Commission has consistently adhered to its pronouncement in its Report on *En Banc Programming Inquiry*, 20 Pike and Fischer RR 1901 at pp. 1913-14 (1960):

> ". . . the ascertainment of the broadcast matter to be provided by a particular licensee (applicant) for the audience he is obligated to serve remains primarily the function of the licensee (applicant). His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee (applicant)."

In view of these considerations, the Commission correctly concluded that no hearing was required. To have decided otherwise would have resulted only in delaying the institution of a badly-needed program service.

Appellant's argument on this point is thus reduced to the untenable conclusion that in passing upon assignment applications wherein the assignee proposes program changes, the Commission is *ipso facto* required to conduct an evidentiary hearing to assess comparative program needs. This argument, it is submitted, is completely without legal foundation. The cases relied upon by appellant (Br. 7-8)[6] certainly do not support its contention since none of the cited cases involved programming or program needs. In fact, in two of the cited cases,[7] the Commission specifically noted that the decision did not involve programming. Moreover, hearings in those cases were required by reason of the fact that they involved either mutually exclusive applications or applications involving objectionable interference to existing stations. *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1946); *Federal Communications Commission v. National Broadcasting Co.* (KOA), 319 U.S. 239 (1943). Here, on the other hand, the question is governed by the requirements of Section 309(d) of the Act. Since the assignee had made a full and complete showing of its programming and the need therefor and since appellant had presented no factual showing to the contrary, the Commission properly concluded that the proposed programming would serve the public interest and no hearing was required.

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[6] *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793 (1948); *Eastside Broadcasting Co.*, 3 Pike & Fischer RR 2d 505 (1964); *Pinellas Radio Co.*, 2 Pike & Fischer RR 2d 155 (1964); *Service Broadcasting Corp.*, 2 Pike & Fischer RR 2d 539 (1964).

[7] *Eastside Broadcasting Co.*, *supra*, at p. 508; *Pinellas Radio Co.*, *supra*, at p. 160.

CONCLUSION

The Commission correctly and properly concluded that appellant's petition should be denied and that the subject application would serve the public interest, convenience, and necessity. The Commission's order should therefore be affirmed.

Respectfully submitted,

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